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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1567

JOHN H. JANSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

JOHN H. JANSEN,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, John H. Jansen, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 15, 1973, affirming the judgment of conviction previously entered in the United States District Court for the Northern District of Illinois, Eastern Division. Petition for Rehearing was denied April 23, 1973.

OPINION BELOW.

The judgment of the District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced as an Appendix to the Petition.

JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on March 15, 1973. Petition for Rehearing was denied on April 23, 1973. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED.

I.

Whether, in a federal criminal jury trial, a defendant suffers automatic prejudice when the Government is allowed to impeach the defendant by using a prior state misdemeanor conviction which came about when the defendant was a minor and where no inquiry was developed as to whether he had counsel when he was convicted?

II.

Whether comments regarding a prior state misdemeanor conviction during the prosecutor's closing argument couple with the trial court's comments deprived the defendant of a fair trial?

III.

Whether the defendant was deprived of his right to a fair trial when the trial court excluded all evidence relating to his theory of defense?

CONSTITUTIONAL PROVISIONS.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

STATEMENT OF THE CASE.

The facts are abundantly simple.

At 2 p.m. of July 8, 1971 Revenue Officers Grant and Morris came to a tavern called the "Orange Tree" to collect a disputed tax bill of $4994. (Tr. 43, 44, 82, 129).[1] At approximately 4 p.m. the Revenue Agents had not yet been paid and went about their task of closing this business (Tr. 26-29). The defendant objected, told the agents the money was coming forthwith and a small argument ensued. The monies in the form of a certified check were brought to the saloon at 4:20 p.m. (Tr. 43, 82, 129). The monies were refused and the defendant was arrested and charged.[2]

The cause was tried to a jury and the defendant convicted, and his conviction was affirmed (App. A).

During the trial defense counsel asked the defendant, on direct examination, whether he had been convicted of a crime and the defendant responded "No" (Tr. 71). The defendant, in fact, had a state misdemeanor conviction while a minor (Tr. 203). Before the cross examination of

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[1] We have used the notation "R" to refer to the original documents filed in the District Court as compiled by the Clerk of the Court. We have used the notation "Tr" to refer to the Court Reporter's Transcript of Proceedings.

[2] 18 U.S.C. §111 provides in part:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5000 or imprisoned not more than three years, or both."

Section 1114 includes "any officer, employee or agent . . . of the Internal Revenue . . .

the defendant the error was brought to the attention of the trial court (Tr. 90-113) and the defense counsel explained that the question was a mistake and should have been "Were you ever convicted of a felony" (Tr. 93, 108). The prosecutor told the court that he intended to question and impeach the defendant regarding his testimony (Tr. 90-113). Defense counsel moved to strike the original question and answer and have the jury disregard same, the motion was denied (Tr. 110). The Court then ruled the prosecutor could ask about the misdemeanor and said he would instruct the jury about the matter (Tr. 112-113). The prosecutor, in fact, impeached the defendant regarding the prior state misdemeanor conviction (Tr. 121). The court excluded evidence on redirect as to the age of the defendant at the time of conviction, his (defendant's) understanding of the original question and the sentence (Tr. 122-123). In final argument the prosecutor stated:

* * *

"If you recall, he testified, 'I have never been convicted of any crime.'

"I asked him if that is, in fact, what he testified to and he said, 'That is correct.' Then I asked him if he had ever been convicted of a criminal damage to property in a case entitled United States v. Jansen and he admitted yes, he was, and that is a crime and he lied about that, too.

"Now I submit to you that in light of all the government's evidence plus in light of the fact that the defendant took the stand and perjured himself—

"Mr. Werksman: I object, Judge. That is a legal conclusion.

"The Court: It is a legal conclusion to say that a man lied.

"Mr. Werksman: I object to that.

"The Court: Perjury implies lying. I suppose it is a conclusion that one makes from the fact that a person lied.

"Since you object to it, and since it is a conclusion, I will sustain your objection on that ground alone." (Tr. 169-170)

The trial court excluded all defense efforts to show that the tax was in controversy (Tr. 51), that a certified check was delivered and refused BEFORE the agents left the saloon (Tr. 43, 82, 129) and that the defendant later received a refund of $3500 (Tr. 44). (The same check which was refused on the afternoon of the prosecuted events was accepted the next morning and the premises restored to the defendant.)

The defense intended to be presented in the trial of this case was the state of mind of the defendant at the time of events, to the end that the defendant did not act with the wilfulness and specific criminal intent necessary to sustain a conviction.

The trial court, repeatedly, stated in the presence of the jury that the proffered defense—the defendant's state of mind—had nothing to do with the charge (Tr. 43, 81). That is to say had nothing to do with the indictment. The court, in its charge to the jury, took a contrary position:

"With reference to the subject of intent, ladies and gentlemen of the jury, knowledge and intentions must be inferred from things done and said by a person and from all of the surrounding circumstances. What a person does, in this instance the defendant, or fails to do, may indicate intent or lack of intent to commit the offense or offenses charged. It is reasonable to infer

that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So that you may draw the inference, unless the contrary appears from the evidence, that the defendant intended all the consequences which one standing in like position and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the defendant.

"In determining the matter of intent, you are entitled, ladies and gentlemen of the jury, to consider any statements made and acts done or omitted to have been done by the defendant and all facts and circumstances in evidence which may aid you in determining his state of mind.

"The crime charged in this case and either of them require proof of specific intent before defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case." (Tr. 185-186)[3]

The court, effectively, precluded the defendant from presenting his theory of defense.

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[3] Charge to Jury on question of "intent."

REASONS FOR GRANTING THE WRIT.

I. and II.

The defendant received less than a fair trial.

This Court has accepted the proposition that under certain circumstances jury prejudice may be presumed. *Marshall* v. *U. S.*, 360 U.S. 310, 79 S.Ct. 1171 (1959). The defendant would suggest that a following line of cases strongly suggest that this court may presume prejudice in this case. *Michaelson* v. *U. S.*, 335 U.S. 469, 69 S.Ct. 213 (1948) considers the following . . . "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer* v. *U. S.*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime . . .". It has long been clear that proof of the prior conviction of a misdemeanor is not admissible to impeach the accused, *Johnson* v. *U. S.*, 9th Cir., 424 F.2d 537 (1970).

The error was compounded by the prosecutor's closing argument:

"If you recall, he testified, 'I have never been convicted of any crime.'

"I asked him if that is, in fact, what he testified to and he said, 'That is correct.' Then I asked him if he had ever been convicted of a criminal damage to property in a case entitled United States v. Jansen and he admitted yes, he was, and that is a crime and he lied about that, too.

"Now I submit to you that in light of all the government's evidence plus in light of the fact that the defendant took the stand and perjured himself—

"Mr. Werksman: I object, Judge. That is a legal conclusion.

"The Court: It is a legal conclusion to say that a man lied.

"Mr. Werksman: I object to that.

"The Court: Perjury implies lying. I suppose it is a conclusion that one makes from the fact that a person lied.

"Since you object to it, and since it is a conclusion, I will sustain your objection on that ground alone."

This argument, it may be assumed, did nothing to further the concept of a fair trial. *In Re Oliver,* 333 U.S. 257, 68 S.Ct. 499 (1948). The comment by the trial judge further removed this defendant from the arena of a fair trial.

The trial judge refused, on redirect examination, to allow defense counsel to rehabilitate his client. The trial judge refused to allow the defendant to answer (1) what he understood his counsel's original question concerning a conviction to mean, (2) refused to permit the defendant to state his age at the time of conviction, i.e. 16 years of age, (3) what sentence, if any, he (the defendant) received in

the 1964 state misdemeanor conviction and (4) the fact that he had entered a plea of guilty, without counsel,[4] to the said misdemeanor charge (Tr. 122-123).

The Court of Appeals opinion considers the split in circuits (App. 5-6) on this crucial question but makes no reference to whether the defendant had counsel at the time the conviction was secured. There leaves little doubt that the earlier conviction was invalid absent counsel. *Gideon* v. *Wainwright,* 372 U.S. 355, 83 S.Ct. 792 (1963), *U. S.* v. *Tucker,* ..... U.S. ....., 92 S.Ct. 589 (1972), *U. S.* v. *Lufman,* 457 F.2d 165 (7th Cir., 1972).

The entire trial became an exercise in futility following the trial court's refusal to strike the original question and answer as to whether the defendant had been convicted of any crime. BEFORE the cross examination and outside of the presence of the jury the mistake was made known to the Court and the Court encouraged the prosecutor to proceed (Tr. 90-113). The closing argument, supra, further served to distract this jury from the realistic issues.

III.

The trial judge precluded this defendant from allowing the jury to determine the validity vel non of the defendant's theory of defense.

"By Mr. Werksman:

Q. Did you at some time subsequent to four o'clock receive a certified check from the man?

Mr. Webb: I object.

The Court: I sustain the objection.

Mr. Werksman, this statute has nothing to do with

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[4] No evidence was presented by the Government that the defendant had counsel at this state misdemeanor conviction.

the amount of money collected or uncollected. It has to do with the conduct, the alleged conduct of the defendant. It has nothing to do with the collection of taxes either by certified check or by any means whatsoever. I repeat my ruling, I sustain the objection." (Tr. 43)

At Tr. 80-81, the following appears:

"Br. Mr. Werksman:

Q. What did you observe in Agent Morris' possession?

A. I observed a white sealed envelope with the Orange Tree letterhead and my name written on the envelope.

Q. Had you seen that envelope earlier in the day?

A. Yes, I had seen it on my desk downstairs when I was making a telephone call. When Agent Morris started to take inventory, he picked it up off from my desk.

Q. Did you discuss this envelope with him?

Mr. Webb: I am going to object, your Honor.

The Court: What is the purpose of this inquiry?

Mr. Werksman: To show my client's state of mind, Judge, at the time that this alleged—all of the verbs alleged in the indictment took place.

The Court: I sustain the objection.

By Mr. Werksman:

Q. Was that your envelope?

Mr. Webb: I object, your Honor.

The Court: I sustain the objection. I see no connection between that and the charges in the indictment, Mr. Werksman." (Tr. 80-81)

Intent was, indeed, an issue for the jury's determination. Absent the wilful and specific criminal intent there was

no crime. *Morissette* v. U. S., 342 U.S. 246, 72 S.Ct. 240 (1952).[5]

Even, absent objection, this charge was plainly erroneous and capable of notice (52(b) F.R.CR. P.). There is ample authority for the proposition that where intent, or lack of intent, comprise a vital part of the defense, it is error to direct the jury that it can draw the inference of intent from the mere commission of acts (*Mann* v. *U. S.*, 319 F.2d 404 (5th Cir., 1963), *Hibbard* v. *U. S.*, 7th Cir., 172 F.2d 66, 72, 73 (1949), *Bloch* v. *U. S.*, 9 Cir., 221 F.2d 786, 788 (1955); *Chappell* v. *U. S.*, 9 Cir., 270 F.2d 274 (1959); *U. S.* v. *Barash*, 2 Cir., 365 F.2d 395, 402, 403 (1966).

To deny the defendant the right to show present acts as reflecting the lack of intent is to deny the defendant the right to a fair trial.[6]

The fundamental fairness granted by the Fifth and Sixth Amendments to the United States Constitution have been denied the petitioner. More important perhaps is that the Government may now feel encouraged to repeat this procedure in similar cases where impeachment is sought through the use of a prior uncounseled misdemeanor conviction involving a minor defendant.

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[5] See Footnote 3

[6] The positive acts which tended to demonstrate lack of intent, inter alia, the following: The monies sought by the agents on July 8, 1971 were the subject of controversy (Tr. 51), the monies were delivered in the form of a certified check at 4:20 p.m. but was refused by the agents (Tr. 43, 82, 129). The defendant received a refund of $3500 (Tr. 44) and that the check was accepted the next morning and the premises restored to the defendant. Certainly, this evidence was competent on the issue of intent and the exclusion of this evidence compels but one conclusion, that the defendant was denied a fair trial. *U. S.* v. *Schavin*, 287 F.2d 647 (7th Cir., 1961), *U. S.* v. *Accardo*, 298 F.2d 133 (1962).

CONCLUSION.

For the foregoing reasons, we respectfully petition this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeal

For the Seventh Circuit

SEPTEMBER TERM, 1972 SEPTEMBER SESSION, 19

No. 72-1246

UNITED STATES OF AMERICA,

Plaintiff-Appell

vs.

JOHN H. JANSEN,

Defendant-Appella

Appeal from the United States District Court for t
Northern District of Illinois, Eastern Division.
No. 71 CR 902
JULIUS J. HOFFMAN, *Judge.*

ARGUED OCTOBER 30, 1972 — DECIDED MARCH 15, 1973

Before KNOCH, *Senior Circuit Judge* and CUMMINGS a
PELL, *Circuit Judges.*

PELL, *Circuit Judge.* Defendant John Jansen appe
from his conviction by a jury of violating 18 U.S.C. § 1

[1] 18 U.S.C. § 111 provides in part:
"Whoever forcibly assaults, resists, opposes, impedes, inti
dates, or interferes with any person designated in section 1

The two-count indictment against him had charged that he "did forcibly assault, resist, oppose, impede, intimidate and interfere with" two named officers of the Internal Revenue Service while they were engaged in the performance of their official duties.

At 2 p.m. on July 8, 1971, officers Edward Grant and Larry Morris, accompanied by several other IRS employees, went to The Orange Tree Tavern in Chicago to collect $4784 in federal taxes allegedly past due or, in the alternative, to "seize" the tavern. On meeting the defendant, who managed the tavern which was owned by his father, the officers identified themselves and explained the purpose of their visit. Jansen responded that he did not have enough money on hand to satisfy the debt. Grant thereupon read him the levy and declared the business seized for nonpayment of taxes. When Jansen stated he could raise the money that day and requested additional time to accomplish this, the agents agreed to wait until 4 p.m. In the interim period, the agents proceeded with the seizure, *e.g.*, had a locksmith change the locks and ordered the bartender to count and turn over to them the contents of the cash register.

Shortly before 4 p.m., the tax still unsatisfied, officer Grant suggested to Jansen that he begin to gather his

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of this title while engaged in or account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both."

Section 1114 includes "any officer, employee or agent . . . of the internal revenue . . ."

possessions in readiness to leave the tavern, which would be closed. Jansen's reaction to this announcement led to his indictment: (1) with arms upraised, he blocked the doorway and told the IRS officers he would not allow them to leave; (2) twice, by striking at officer Morris and holding down the telephone hook, he prevented Morris from calling the police; (3) he ignored Grant's warning to stand clear; (4) he knocked Grant's credentials from the agent's hand and ran to the back of the cocktail lounge, where Grant pursued him and retrieved the credentials; and (5) he grabbed the moneybag holding the contents of the seized cash register from Morris' hands and, when Morris started to give chase, raised his hands toward Morris. Later, after Jansen was arrested, officer Grant recovered the moneybag at which time he discovered $234 was missing.

Jansen urges reversal on the basis of certain alleged procedural errors, the most significant of which arises from testimony of his having had a prior conviction for a misdemeanor. The attention given to the earlier conviction supposedly distracted the jury from the real issues at stake and created ineradicable prejudice against the defendant.

Apparently in an effort to show Jansen's good character, his counsel asked on direct examination: "Have you ever been convicted of a *crime*?" Jansen replied in the negative. At a subsequent conference between counsel and the court called at the Government's request and held outside the presence of the jury, Jansen's lawyer explained that he had made an unfortunate slip of the tongue; he and Jansen had practiced and he had intended to ask the question "Have you ever been convicted of a *felony*?" The defendant had been convicted of criminal damage to property,

a misdemeanor under Illinois law. The Government attorney later elicited testimony from the defendant on cross-examination concerning the prior conviction.[2] The trial court overruled defense counsel's objection to the impeaching questions.

We find no abuse of discretion in the court's determination not to strike the exchange between Jansen and his attorney, the course of action suggested by the attorney at the conference. Counsel had posed the question at the beginning of the direct examination. The prosecutor was well into his cross examination of Jansen when the discussion with the court took place. That conference lasted until the end of the court day and was resumed the following morning. Thus, the jury had heard the defendant's denial a substantial period of time before the defense attorney proposed that the exchange be struck. The purported fact had been placed without question before the jury, and we are unaware of any basis for saying that it was error not to strike out the question and answer, particularly in the belated posture here involved. If counsel had listened to his own words and had sought immediately to correct them, the result might have differed. He apparently did neither.

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[2] The transcript reads:

"Q. I believe you stated yesterday on direct examination, Mr. Jansen, that you had never been convicted of a crime, is that correct?

"A. Yes, it is.

"Q. Mr. Jansen, are you the same John [J]ansen who on August 27, 1964 was convicted of the crime of criminal damage to property in a case entitled People of the State of Illinois v. John Jansen?

"A. I pled guilty to damaging property, yes."

The Government acknowledges that, absent defense counsel's question on direct, the prosecution would have been precluded from cross examining Jansen about his prior misdemeanor conviction. It argues, however, that once the matter was raised, the prosecutor had a duty to impeach the veracity of defendant's answer. The Government distinguishes this limited use of the misdemeanor conviction from an assault on Jansen's general credibility as a witness. A defendant's general credibility as a witness can be impeached only by a felony conviction. See *United States* v. *Bishop*, 457 F.2d 260, 262 (7th Cir. 1972).[3] We also note that the court, in its charge, instructed the jury as to the limited purpose for which it was to consider the misdemeanor conviction.

Because Jansen made his statement on direct examination, the present case falls outside the rule that a witness may not be impeached by contradiction as to collateral or irrelevant matters elicited on cross examination, see, *e.g.*, *United States* v. *Lambert*, 463 F.2d 552, 557 (7th Cir. 1972). Further, although we are aware of Wigmore's argument against allowing contradiction of all extraneous or volunteered assertions made on direct examination, 3A WIGMORE, EVIDENCE § 1007 (Chadbourn rev. 1970), decisions by the United States Supreme Court and by several courts of appeals, among them this court, strongly suggest that the impeachment here was permissible. *See, e.g.*, *Walder* v. *United States*, 347 U.S. 62 (1954); *United States* v. *Rosenfield*, 469 F.2d 598, 600 (3d Cir. 1972); *United States* ex rel.

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[3] The scope of the impeaching crime is often said to include a misdemeanor involving moral turpitude. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 43, at 90 (1954). While the misdemeanor of which Jansen was convicted is a crime, there is no contention that it involved moral turpitude.

Walker v. *Follette*, 443 F.2d 167 (2d Cir. 1971); *United States* v. *Holtzman*, 440 F.2d 923 (7th Cir. 1971); *United States* v. *Colletti*, 245 F.2d 781 (2d Cir. 1957), *cert. denied*, 355 U.S. 874. We therefore hold that the trial court did not err in overruling the defendant's objections to the impeachment questions.

On redirect examination, defense counsel attempted to rehabilitate his client. However, the court sustained objections to three of the five questions counsel posed. The result was that Jansen was allowed to respond only to queries whether he had ever been convicted of a felony and what his plea to the misdemeanor charge had been.[4]

Although the circuits differ as to the extent to which they permit a witness, on redirect examination, to explain a conviction shown for impeachment purposes, most leave such rehabilitation to the discretion of the trial judge. *E.g.*, *United States* v. *Pinna*, 229 F.2d 216, 219 (7th Cir. 1956). The cases we have found that treat this problem, however, involve the use of a prior conviction to impeach a witness' general credibility.[5] Here, through an admission elicited from the defendant, the prosecutor in effect corrected misinformation that Jansen had given on his direct

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[4] Counsel dropped the matter and took no other tacks at rehabilitation. Also, there was no formal offer to prove. However, such an offer is unnecessary where it is clear what the substance of the proposed evidence would be. See *United States* v. *Dellinger*, ... F.2d ....., No. 18295 (7th Cir., Nov. 21, 1972), slip op. at 64.

[5] Wigmore's comment that "it would seem a harmless charity to allow the witness to make such protestations on his own behalf as he may feel able to make with a due regard to the penalties of perjury" also does not refer to the limited impeachment situation present in the instant case. 4 WIGMORE, EVIDENCE § 1117, at 191 (3d ed. 1940 and 1970 Supp.).

examination. The wisdom of limiting discussion about the misstatement is thus much more obvious under these circumstances than when a party has tried to discredit a witness' character. If not disallowed, defense counsel's questions on redirect would have opened a clearly collateral matter. We therefore cannot agree that the trial judge abused his discretion in rejecting two of the "rehabilitative" questions: how old Jansen had been at the time of the conviction and what sentence he had received.[6]

As for the third disallowed question—"When I asked you whether you had been convicted of a crime yesterday, what did you understand me to mean?"—we concur with the Government that the form of the question was bad. It called for Jansen's subjective conclusion about his attorney's intention.

Jansen also contends that the prosecutor made improper statements during closing argument about defendant's credibility and that the trial judge made improper comments when ruling on defendant's objection to those statements.

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[6] We note that the jurors had been given information which could have enabled them to calculate Jansen's age at the time of his misdemeanor conviction: Jansen had testified on direct that he was 29 years old, and, on cross-examination, he had said that he was the same John Jansen who had been convicted in 1964.

The question about the sentence imposed was clearly intended to diminish the significance of the conviction. If Jansen had been allowed to answer, the Government might then have contended that it, too, should be allowed to go into the details surrounding the misdemeanor conviction in order to rebut the misleading inferences that such testimony might create. According to the Government, the misdemeanor charge had resulted from plea bargaining; the charge originally had been burglary and arson. In our opinion the district court properly curtailed the expeditions into these collateral and potentially confusing extraneous matters. *Cf. United States* v. *Dow*, 457 F.2d 246, 250 (7th Cir. 1972).

We find no reversible error. First, the prosecutor's inadvertent reference to "United States v. Jansen" rather than to "The People of the State of Illinois v. Jansen," the accurate title of the defendant's misdemeanor case, could not have confused the jury or prejudiced Jansen's right to a fair trial. Second, the Government attorney used the impeaching conviction as but one of several examples of what he considered to have been "lies" by the defendant. A prosecutor is allowed to comment on the credibility of a defendant who takes the witness stand. *United States* v. *Deloney*, 389 F.2d 324, 326 (7th Cir. 1968), *cert. denied*, 391 U.S. 904. *Cf. United States* v. *Porter*, 432 F.2d 548 (9th Cir. 1970), *cert. denied*, 400 U.S. 928. Third, the prosecutor's rather ill-considered statement that by this false testimony Jansen had "perjured himself" was objected to, and the objection as made was sustained. When so ruling, the trial judge did not, as Jansen charges, imply that he agreed with the prosecutor's characterization of the defendant's testimony. Rather, as we read the record, the judge was explaining why he was sustaining the objection and why the jury should ignore the Government's statement.

At trial, Jansen had two intended lines of defense: (1) his use of force had been so minimal as to be legally insignificant, and (2) emotional distress had caused him to act as he had on the afternoon of July 8, 1971, and he therefore had lacked the intent necessary to commit the crime charged. On appeal, the defendant emphasizes the second argument. He maintains that the trial court precluded the effective presentation of this "defense" by not permitting him to show that (a) the amount of the tax due was in controversy; (b) a certified check in the amount of the tax supposedly due was in fact delivered at about

4:20 p.m. but was refused by the agents; and (c) the defendant later received a refund of approximately $3500. In addition to the claim that the court ruled erroneously on these evidentiary matters, the defendant also contends that the court stated repeatedly in the presence of the jury that the proffered defense had nothing to do with the crime charged.

We find no reversible error. We first note that at least matters (a) and (c) were before the jury through Jansen's own testimony. More importantly, however, we disagree that the three points, even if true, constitute a defense to a charge of violating 18 U.S.C. § 111 or negate the existence of an intent forcibly to assault, resist, impede, etc. This court's decision in *United States* v. *Spingola,* 464 F.2d 909 (7th Cir. 1972), upon which Jansen relies, is inapplicable to this case.

"The purpose of this section [§ 111] is to provide federal officers the protection of federal courts when such officers are performing their duties." *United States* v. *Johnson,* 462 F.2d 423, 427 (3d Cir. 1972). The statute's aim is frustrated if an individual is allowed to resist federal agents when engaged in their official duties because the individual believes he owes less than the amount demanded. See *United States* v. *Johnson, supra,* where the Third Circuit upheld the trial court's refusal to admit evidence tending to show that defendant, who had blocked the exit, was the true owner of property seized by IRS agents.

Jansen, however, seeks to avoid the force of section 111 by arguing that his motive in preventing Grant and Morris from leaving the tavern was to aid, not obstruct, the IRS officers in the performance of their duties, that is, the collection of delinquent taxes. The defendant mistakenly

assumes that he had a right to delay the seizure of the premises; actually, the officers had waited until 4 p.m. as an accomodation to Jansen. We reject the defendant's proposition that a private individual may decide how and when federal officers acting within the scope of their authority should carry out their duties. This is not the proper criterion for determining whether the individual has breached section 111.

As for the trial judge's supposed negative comments on Jansen's theory of defense, the transcript citations to which defendant refers us reveal no such prejudicial remarks.

Jansen next seeks reversal on the basis of the district court's charge to the jury. Most of the contentions are within the framework of reference of "plain error," which ordinarily, as it does here, connotes a failure by trial counsel to comply with the salutary purpose of Rule 30, Fed. R. Crim. P., to bring to the attention of the trial judge claimed deficiencies of both instructions to be given and those refused. Here, trial counsel failed to tender any instructions, and, although counsel were afforded an opportunity to object both before and after the giving of the charge, the defense's minimal objections were not of a nature to point out to the experienced trial judge the errors which were first articulated on this appeal. In this context, we would be rendering scant service either to the letter or to the spirit of Rule 30 if we adhered to any lesser standard than that suggested in the Webster definition of "plain," *i.e.*, evident or obvious. On that basis, we find the contentions advanced to be without merit.

Jansen attacks the court's "inference from conduct" general intent instruction as undermining the alleged defense

of lack of specific intent. Without reaching the always troublesome question of whether specific intent it required for proof of guilt of a particular crime,[7] we note that the district court did, in its charge, state the necessity of proof of specific intent before a conviction could be had, utilizing in this respect the La Buy instruction, 33 F.R.D. 523 (1963).

Jansen also attacks the court's instruction on the burden of proof as conveying "a sense of rebuke for [defendant's] daring to plead not guilty. . . ." Jansen's interpretation of the court's instruction is unwarranted as the challenged statements were part of a full discussion concerning the presumption of innocence and reasonable doubt.

Jansen attacks the failure of the court to give an instruction pertaining to the credibility of witnesses generally while including in its charge reference to the fact that "the defendant's testimony is to be judged in the same way as that of any other witness, bearing in mind that he is the defendant in the case and of course has an interest in the result of the trial." At best, trial counsel may have mildly and ambiguously suggested that the defendant is no different than any other witness, but, of course, he is different in that he does have an interest. We do not know why the general credibility of witnesses instruction was not given, but we do know that trial counsel neither suggested nor tendered it. While counsel on this appeal were not the trial counsel, and perhaps thereby are freer in finding fault, we are unable to agree with the contentions that the instructions deprived Jansen of a fair trial.

Finally, Jansen argues that the trial judge, in sentencing him, imposed "extra punishment" for his having elected to

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[7] *Cf. Finn* v. *United States*, 219 F.2d 894, 901 (9th Cir. 1955), *cert. denied*, 349 U.S. 906.

exercise his rights to plead not guilty and to have a jury trial. The judge sentenced Jansen to one year in prison and fined him $1500 on each count, the terms of imprisonment to run concurrently.

For this argument, Jansen relies on certain comments the judge made. If the judge did penalize the defendant for pleading not guilty, he, of course, acted improperly. See *United States* v. *Lehman,* 468 F.2d 93, 110 (7th Cir. 1972), *cert. denied,* 41 U.S.L.W. 3222. We have carefully examined the pertinent portion of the transcript, however, and we conclude that the remarks, when read in context, do not bear the construction that defendant seeks to place upon them.

We first note that, prior to imposing sentence and before making the allegedly objectionable comments, the judge expressly complimented defense counsel: "I think your way of . . . defending the case was a wise one. If it could have been won, and I don't think it could have been won, you chose the right way to do it." Second, we find the group of statements ending with "The feeling of contrition here has come too late" to be ambiguous. A reasonable interpretation is that the judge "considered a policy of leniency following a plea of guilty to be proper but that sentence concessions flowing from such a plea are inapplicable to the full trial situation." *Lehman, supra,* 468 F.2d at 110. Third, the final comments of which Jansen complains, particularly "He has chosen the wrong course in this case. . . . He has aggravated his offenses," came after the sentence had been pronounced and reflected, we believe, the judge's impatience with defense counsel's continuing to discuss mitigating circumstances. The judge considered the matter closed.

We have examined the other claimed errors and find them without merit. Accordingly, we affirm the conviction of John Jansen.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

April 23, 1973.

On consideration of the petition of defendant-appellant John H. Jansen for a rehearing by the Court in the above entitled appeal, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the defendant-appellant for a rehearing in the above entitled appeal be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1567

JOHN H. JANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of forcibly assaulting, resisting, opposing, impeding, intimidating, and interfering with Internal Revenue Service agents in the performance of their duties, in violation of 18 U.S.C. 111. He was sentenced to one year's imprisonment and fined $3,000. The court of appeals affirmed (Pet. App. 1a-13a).

Petitioner contends that the prosecutor improperly questioned him about a prior misdemeanor conviction and that the trial judge improperly excluded evidence bearing upon intent. These issues were thoroughly explored and properly rejected by the court below, on whose opinion we primarily rely.

Petitioner contends that the trial court erroneously excluded evidence pertaining to his state of mind at

the time of the acts charged in the indictment. Petitioner apparently wished to show that his forcible and violent attacks on the Internal Revenue Service agents seizing his tavern proceeded from a sense of aggrieved injustice—that petitioner was at the time of the seizure seeking to raise funds with which to pay the tax and that he feared certain personal property (the "envelope;" Pet. 11) would be seized. But as the court of appeals properly held, proof of such a state of mind would not "constitute a defense * * * or negate the * * * intent forcibly to assault, resist, impede, etc." (Pet. App. 9a).

The cross-examination about petitioner's prior misdemeanor conviction was proper in this case because the defense had opened the door on direct examination by eliciting from petitioner a denial that he had ever been convicted of any "crime." Petitioner now suggests, apparently for the first time, that he was not represented by counsel at the time of his prior misdemeanor conviction and that he was foreclosed from testifying to that effect on re-direct examination. There is no support for these assertions in the record. But, in any event, the use of uncounseled prior convictions to rebut a witness's specific statement—in this case, petitioner's claim that he had never been convicted of a crime—is permissible. See *Loper* v. *Beto,* 405 U.S. 473, 482, n. 11.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07